

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7752

Petition of Vermont Transco LLC and Vermont Electric)
Power Company, Inc. (together referred to as)
"VELCO"), for authority to condemn easement rights in)
property interests of Olga Julinska, Sergei Kniazev,)
Carver Federal Savings Bank and BNE Energy, Inc.,)
located in Wells, Vermont, for the purpose of)
reconstructing and maintaining an existing)
telecommunications facility for the so-called Statewide)
Radio Project (SRP))

Order entered: 11/9/2011

ORDER DENYING MOTION FOR PROTECTIVE ORDER

On October 17, 2011, Ms. Olga Julinska and Mr. Sergei Kniazev (the "Landowners") filed a motion for a protective order seeking to defer the deposition of Mr. Kniazev by Vermont Electric Power Company, Inc. ("VELCO" or the "Company").¹ On October 19, 2011, VELCO filed a response stating that it would defer deposing Mr. Kniazev until after I had ruled on the Landowners' Motion.² On October 24, 2011, I issued a summary ruling denying the Landowners' Motion.³ In this Order today, I set forth my grounds for that summary decision.

The Landowners' Motion was filed after VELCO noticed the deposition of Mr. Kniazev for October 20, 2011. The Landowners objected to the deposition of Mr. Kniazev on the following grounds: (1) Mr. Kniazev does not intend to appear as a testifying witness in this proceeding; (2) Mr. Kniazev is not knowledgeable about the valuation of the property rights VELCO has proposed for condemnation in this proceeding; (3) Mr. Kniazev's knowledge of the relevant facts is no different from the knowledge of Ms. Julinska, his wife and business partner who is expected to testify in this docket because she "has been principally responsible in the family for all issues dealing with the matter before the Public Service Board . . .;" (4) the Landowners' small business is "at its busiest in October and November;" and (5) the asserted

1. *Olga Julinska and Sergei Kniazev's Motion for Protective Order* (hereinafter the "Landowners' Motion").

2. *VELCO's Response to Olga Julinska and Sergei Kniazev's Motion for a Protective Order* at 2 (hereinafter the "VELCO Reply.")

3. That summary denial was issued for the convenience of the parties to permit them to prepare for and conduct timely and adequate discovery consistent with the filing deadlines set forth in the Second Scheduling Order that was issued on October 18, 2011.

undue burden posed for the Landowners by the need to "hire sitters for their three children and incur all the costs and time necessary to prepare Mr. Kniazev for a deposition."⁴

Apart from objecting in the entirety to any deposition at all of Mr. Kniazev, the Landowners further have sought, in the alternative, to defer his deposition until after Ms. Julinska has been deposed, "and then only upon further order of the Board for good cause shown with respect to specific areas of inquiry."

In opposing the Landowners' Motion, VELCO argues that the deposition of Mr. Kniazev, who is a named party to this proceeding, is authorized by Public Service Board Rule 2.103 and Vermont Rule of Civil Procedure 30.⁵ The Company represents that its request to depose Mr. Kniazev is reasonably calculated to lead to the discovery of admissible evidence.⁶ VELCO further notes that it has the discretion to determine the order in which it conducts depositions, while simultaneously acknowledging that in the discovery process, "a party must act in good faith, believe that the party's claim has merit and refrain from requests that are intended to harass or cause undue expense or delay."⁷

In Vermont a motion for a protective order in discovery may be granted for good cause shown "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" ⁸ In deciding such motions, courts generally insist "on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause."⁹ A motion seeking to prevent the taking of a deposition "is very unusual" and "absent extraordinary circumstances, such an order would likely be in error."¹⁰

The Landowners have not produced the requisite particular facts that specifically demonstrate good cause for either dispensing with or deferring the deposition of Mr. Kniazev. While I recognize that preparing for and attending a deposition may be time consuming, burdensome and expensive for Mr. Kniazev and his family, these activities are typical of the

4. Landowners' Motion at 3.

5. P.S.B. Rule 2.103 states that the broad discovery standard applicable in civil court proceedings applies as well in contested cases before the Vermont Public Service Board. In turn, V.R.C.P. 30(a) specifies that "any party may take the testimony of any person, including a party, by deposition upon oral examination."

6. VELCO Reply at 5.

7. VELCO Reply at 4 (citing *Chrysler Corp. v. Makovec*, 157 Vt. 84, 91, 596 A.2d 1284, 1288 (1991)).

8. V.R.C.P. 26(c).

9. 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure*, § 2035 (2d.2009).

10. *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)(citing 4 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 26.69 (3d ed. 1976); 8 C. Wright & A. Miller § 2037 (1970)).

inconveniences that are integral to the litigation process – they do not, in and of themselves, constitute oppression or an *undue* burden for a party such as Mr. Kniazev, who is an owner of record of the property at issue in this condemnation proceeding.

The Landowners maintain that VELCO has articulated "no good reason" for deposing Mr. Kniazev beyond the possibility "that he might have relevant information."¹¹ However, V.R.C.P. 30 authorizes depositions precisely for the purpose of allowing a party to discover whether a possible witness in fact possesses potentially relevant information. As grounds for deposing Mr. Kniazev, VELCO contends that he "possesses facts, knowledge, and opinions about his family's dispute with VELCO . . . [and] the family's current and planned use for the property"¹² In turn, the Landowners assert that Mr. Kniazev is less knowledgeable about such matters than Ms. Julinska and that "at best his testimony would be duplicative or speculative."¹³ On balance, it would be inappropriate for me to cut short VELCO's opportunity for discovery by simply accepting at face value the Landowners' conclusory representations regarding the potential competence and utility of any evidence Mr. Kniazev could provide.¹⁴ Depending on the outcome of the deposition, the Landowners' objections may be more appropriately raised in the event VELCO seeks to call Mr. Kniazev as a witness at the technical hearing. Therefore, I decline at this time to foreclose VELCO from deposing Mr. Kniazev as this would deprive VELCO of a full and fair opportunity to discover for itself the strengths and weaknesses of its case.¹⁵

11. Landowners' Motion at 5.

12. VELCO Reply at 5.

13. Landowners' Motion at 5 and 6.

14. 8 C. Wright & A. Miller § 2037 ("A witness cannot escape examination by claiming that he has no knowledge of any relevant facts, since the party seeking to take the deposition is entitled to test his lack of knowledge") The Landowners cite the case of *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979), for the proposition that a court may order the deferral of a noticed deposition on the grounds that a more knowledgeable witness should be deposed first. Landowners' Motion at 6. The *Salter* case is an example of the application of the so-called "Apex" deposition rule, pursuant to which some courts have limited or precluded the deposition of a busy government official or a very high corporate officer who is unlikely to have personal familiarity with the facts of the case. *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 125 (D. Md. 2009) (collecting cases). I am not persuaded that Mr. Kniazev's circumstances answer to this description.

15. See *Chrysler Corp. v. Makovec*, 157 Vt. at 89, 596 A.2d at 1277-88 (citation omitted) ("Discovery is one of the most important legal tools available in the search for truth, the fundamental purpose of litigation. It allows parties to acquire the fullest knowledge of relevant facts so that cases are decided 'by what the facts reveal, not by what facts are concealed.'")

Nor am I persuaded that the Landowners have shown good cause for challenging the order in which VELCO may choose to depose Ms. Julinska and Mr. Kniazev. Absent any verified allegations from the Landowners of bad faith or harassment on VELCO's part, I see no basis at this time for so restricting the Company's tactical decisions in discovery.

For the foregoing reasons, the Landowners' Motion is denied.

So ORDERED.

Dated at Montpelier, Vermont, this 9th day of November, 2011.

s/June E. Tierney
June E. Tierney, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: November 9, 2011

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)